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CHIEF OF COURT  
U.S. SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

KARL J. BRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.

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Petitioner claims --/and we agree -- that the Tenth Circuit erred in holding that the Temporary Emergency Court of Appeals had exclusive jurisdiction to entertain his appeal from a conviction for criminal contempt.

On June 25, 1973, in connection with an inquiry into possible violations by petitioner of the Economic Stabilization Act of 1970, 85 Stat. 743 (see 12 U.S.C.A. 1904), Internal Revenue Service Investigator J. Boyd Gee served a subpoena upon petitioner directing him to produce certain business records. Following petitioner's refusal to comply with the subpoena, a petition for enforcement was filed in the United States District Court for the District of Utah. The district court granted the petition and ordered petitioner to show cause why he should not be required to appear and produce the requested records. On August 6, 1973, petitioner moved to dismiss the show cause order on the ground that the Economic Stabilization Act was unconstitutional and that the Fifth Amendment privilege against self-incrimination barred compulsory production of his business records. The district court denied the motion. The Court of Appeals for

the Tenth Circuit dismissed petitioner's appeal for want of jurisdiction and directed that the appeal papers be forwarded to the Temporary Emergency Court of Appeals,<sup>1/</sup> which in turn declined to accept the case because notice of appeal was untimely. This Court denied certiorari, 417 U.S. 928.

Thereafter, the district court ordered petitioner to comply with the subpoena and produce the records set forth therein for inspection and copying by Internal Revenue Service investigators. Upon petitioner's refusal to comply, the court ordered him to show cause why he should not be adjudged guilty of criminal contempt. At a hearing before the court on October 2, 1974, petitioner, represented by counsel, was found guilty of criminal contempt, in violation of 18 U.S.C. 401. On November 18, 1974, he was sentenced to imprisonment for sixty days.

The Tenth Circuit refused to accept petitioner's appeal, although both the government and petitioner, in supplemental briefs called for by the court after briefs on the merits had already been submitted, agreed that that court had jurisdiction. The court reasoned that even though the appeal was sought to be taken from a conviction for criminal contempt, the underlying proceedings involved a subpoena issued pursuant to the Economic Stabilization Act, and thus exclusive jurisdiction was vested

1/ Section 211(b)(2) of the Economic Stabilization Act provides:

Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

in the Temporary Emergency Court of Appeals.<sup>2/</sup> The court therefore dismissed petitioner's appeal for want of jurisdiction (Pet. App.).

We agree with petitioner that he was entitled to review by the Tenth Circuit of his conviction for contempt.<sup>3/</sup> Although an agency investigation within the purview of the Economic Stabilization Act was the ultimate source of petitioner's dilemma, he has been convicted, not for a violation of any provision of that Act, but for a violation of an order of the district court. The statutory authority invoked by the government to obtain a subpoena for petitioner's records was relevant to determine the lawful nature of the demand, but it was only collateral to the court's exercise of its power to compel compliance with its process. Thus, the court of appeals' lack of jurisdiction over controversies arising under the Economic Stabilization Act did not affect its jurisdiction to review district court action taken under a different fount of authority, viz., the court's power to punish for contempt. Indeed, the independent nature of the contempt power is best exemplified by the fact that its exercise may be upheld even if the order upon which the criminal contempt is based has been set aside on appeal. United States v. United Mine Workers, 330 U.S. 258, 294. Cf. Cheff v.

Schnackenberg, 384 U.S. 373, 377-378 ("[I]t matters not that

2/ Apparently petitioner did not seek review in that court.

3/ Our agreement with petitioner is limited to his jurisdictional claim regarding the contempt conviction. We do not agree with his arguments regarding the unconstitutionality of the Economic Stabilization Act or the availability of the Fifth Amendment privilege against self-incrimination to bar prosecution for contempt. These contentions, set forth in the petition for a writ of certiorari, have not been examined by a court of appeals and are therefore not ripe for consideration by this Court.

the contempt arises indirectly from proceedings of an administrative agency. Cheff was found in contempt of the Court of Appeals, not of the [agency].").<sup>4/</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals reversed, and the case remanded to the Tenth Circuit for further review.

ROBERT H. BORK,  
Solicitor General.

OCTOBER 1975.

<sup>4/</sup> In an analogous case, the Temporary Emergency Court of Appeals itself declined to entertain an appeal from a conviction under 18 U.S.C. 1001 for making false statements to the Price Commission, an agency created pursuant to the Emergency Stabilization Act. United States v. Cooper, 482 F.2d 1393. The Temporary Emergency Court of Appeals correctly ruled that its limited special jurisdiction to entertain appeals of "cases or controversies" under the Act was not to be broadly construed to confer criminal appellate jurisdiction over proceedings already covered by other courts of appeals. The case was returned to the Ninth Circuit, which then accepted jurisdiction and affirmed the conviction. United States v. Cooper, 501 F.2d 1089.